WEE CHOW YONG, EX P; PUBLIC FINANCE BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[BANKRUPTCY NO. 29(43)-337-88]
11 AUGUST 1989

BANKRUPTCY: *Application to set aside bankruptcy notice - Whether leave of Court necessary - Issue of bankruptcy notice only after final judgment*

The judgment creditor having obtained final judgment had on 9 June 1988 caused to be served upon the judgment debtor a bankruptcy notice with which he had not complied with within seven days after service as required under s. 3(1)(i) of the Bankruptcy Act 1967.

The judgment debtor then sought to impugn the bankruptcy notice on the ground that it had been issued on 12 May 1988 although the judgment debt upon which it was grounded was dated 13 May 1982. It was said that the proceedings in bankruptcy had been commenced more than six years after judgment had been recovered without the leave of the Court as required under O. 46 r. 2(1) of the Rules of the High Court 1980. Counsel for the judgment creditor argued that r. 276 of the Bankruptcy Rules 1969 expressly provides that the Rules of the High Court 1980 regulating the procedure in its civil jurisdiction shall not apply to any proceedings in bankruptcy and that accordingly since no leave was required for commencing bankruptcy proceedings founded on a judgment entered more than six years previously, no such leave was required.

Held:

[1] The provisions of s. 3(1) of the Bankruptcy Act 1967 overrides r. 276 of the Bankruptcy Rules since it is the principal legislation whereas the Bankruptcy Rule is a subsidiary legislation. The UK decisions are relevant in construing s. 3(1) of the Bankruptcy Act.

[2] To entitle a creditor to issue a bankruptcy notice, he must be in a position to issue execution at the time when he issues the bankruptcy notice. A creditor can issue a bankruptcy notice only when he has obtained a final judgment or a final order. The judgment or order must be one on which the creditor is in a position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with leave of the Court, the creditor must obtain such leave before he can issue a bankruptcy notice.

[3] Since the judgment debt was dated 31 May 1982 and the bankruptcy notice upon which it was grounded was issued on 12 May 1988, it was still within the six year time limit imposed by O. 46 r. 2(1). There was no need therefore, for leave to issue execution against the judgment debtor at the time of the issue of the bankruptcy notice.

[Application to set aside. Bankruptcy notice dismissed.]

Cases referred to:

Re v. Gopal ex parte Bank Buruh (M) Bhd. [1987] CLJ (Rep) 602
Re A Bankruptcy Notice [1898] 1 QB 383
Re Ide, Ex parte Ide [1886] 17 QBD 755
Woodall, Ex parte Woodall 13 QBD 479
Dato Loh Fook Yeu, ex parte Malayan United Finance Bhd. [1988] 3 MLJ 499
Rengasamy Pillai v. Comptroller of Income Tax [1970] 2 MLJ 233 PC
Ghazali bin Mat Nor v. Southern Bank Bhd. [1989] 1 CLJ (Rep) 35
Nova Sdn. Bhd. v. Kasih Sayang Realty Sdn. Bhd. [1988] 2 MLJ 268
Ratna Ammal v. Tan Chow Soo [1971] 1 MLJ 277

Legislation referred to:
Bankruptcy Act 1883 [UK], ss. 1(1)(g), 4
Bankruptcy Act 1967, ss. 3, (1)(i), (g)
Interpretation Act 1967, s. 23(1)
Limitation Act 1953, s. 6(3)
Rules of the High Court 1980, O. 46 r. 2(1)

For the judgment creditor - Louis E. Van Buerle (Tan Hiang Joo with him); M/s. Cheong Wai Meng & Van Buerle
For the judgment debtor - Darshan Singh; M/s. Darshan Singh & Co.

JUDGMENT

Edgar Joseph Jr J:

In this case the judgment debtor has sought to impugn the bankruptcy notice herein on a number of grounds.

First of all, the bankruptcy notice having been issued on 12 May 1988 and served upon the judgment debtor on 9 June 1988 although the judgment debt upon which it was grounded was dated 13 May 1982, it was said that proceedings in bankruptcy had been commenced more than six years after judgment had been recovered, without the leave of the Court as required under O. 46 r. 2(1) of the Rules of the High Court 1980. The case *Re v. Gopal ex parte Bank Buruh (M) Bhd.* [1987] 1 CLJ (Rep) 602 was cited in support.

Now, I need hardly say that a condition precedent to bankruptcy is that a debtor must have made himself liable to be proceeded against by committing an act of bankruptcy, that it is to say, one of the eight acts which constitute presumptive evidence of insolvency and which is the judicial event upon which the Court has the power to make a receiving order. (See s. 3(1) of the Bankruptcy Act 1967 ("our Act")).

In the present case, the only act of bankruptcy alleged was that the judgment creditor having obtained a final judgment had caused to be served upon the debtor the bankruptcy notice aforesaid with which he had not complied within seven days after service. (See s. 3(1)(i) of our Act).

The key to the solution of the problem posed by this branch of the judgment debtor's submissions is the proper interpretation to be placed on s. 3(1)(i) of our Act and the proviso thereto which, omitting immaterial portions, read as follows:

> A debtor commits an act of bankruptcy ...
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him ..., a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order,...and he does not within seven days after the service of the notice ..., comply with the requirements of the notice ...
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> Provided that for the purposes of this paragraph... any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or order;...

In UK the provisions of s. 1(1)(g) of the Bankruptcy Act 1883, which are generally in *pari materia* with s. (3)(1)(i) of our Act, have been judicially considered and I have derived assistance from the cases decided there.

Before I embark upon a consideration of the UK decisions, I would make the preliminary observation that the issue of a bankruptcy notice is not execution to enforce a judgment. (See e.g., *In re Bankruptcy Notice* [1898] 1 QB 383 per Chitty LJ at p. 386). At most it seems to me that the issue of a bankruptcy notice may be regarded as a special species of practical enforcement.

I shall not take the cases in UK to assist me in my task of interpreting s. 3(1)(g) of our Act.

In *re Ide, Ex parte Ide* [1886] 17 QBD 755 the creditor had obtained judgment a firm and had purported to issue a bankruptcy notice founded on that judgment against an individual partner. By s. 4(1)(g) of the Bankruptcy Act 1883, the statutory predecessor of the Bankruptcy Act 1914, it was a condition for the validity of a bankruptcy notice founded on a final judgment or final order that execution had not been stayed thereon. The Court of Appeal held that on a proper construction of the subsection, to entitle a creditor to issue a bankruptcy notice he must be in a position to issue execution on his judgment at the time when he issued his bankruptcy notice.

In other words - I would interpolate - in addition to there being no stay on the judgment there must be no other impediment to issue execution on the judgment. Accordingly, O. XLII r. 10(c) of the RSC (the predecessor of the present O. 81 r. 5(4) requiring the leave of the Court to issue execution, was held to be such an impediment.

In *Woodall, ex parte Woodall* 13 QBD 479 one Houlston had recovered a final judgment against Woodhall. Houlston then died and his executrix served a bankruptcy notice on Woodall without obtaining leave of the Court under r. 23 of O. XLII of the RSC 1883 to issue execution on the judgment. The bankruptcy notice not having been complied with, the executrix presented a bankruptcy petition. The Registrar made a receiving order.

On appeal, the question for decision was whether the executrix was a "creditor" within the meaning of s. 4(1)(g) of the Bankruptcy Act 1883.

It was argued that the representative of the person who originally obtained the final judgment does not fill the character of creditor under subsection 1(g), if he has not obtained leave under r. 23 to issue execution.

In upholding that submission, Bagally LJ said:

> But those words ("and execution thereon not having been stayed") in subsection 1(g) tend to show that the creditor spoken of must be a person who is in a position to issue execution upon the final judgment. The original creditor is in that position, if the person who applies for the notice is the executor of the original judgment creditor he does not, as I read the subsection, fill the required character until he has obtained leave to issue execution on the judgment.

The cases of *In Re Ide* and *Ex parte Woodall* have stood unchallenged for more than 100 years and I take it that they represent the law on the point concerned.

To my mind, it is not unfair summary of the position in the UK to say that a creditor can issue a bankruptcy notice only when he has obtained a final judgment or final order. The judgment or order must be one on which the creditor is in a position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with the leave of the Court, the creditor must obtain such leave before he can issue a bankruptcy notice.

It was urged upon me by Counsel for the judgment creditor that I should decline to follow the cases of *In re Ide* and *Ex parte Woodall* because in this country unlike in UK, we have r. 276 of the Bankruptcy Rules 1969 ("BR") which expressly provides that the Rules of the Supreme Court (now the rules of the High Court 1980) regulating the procedure in it's civil jurisdiction shall not apply to any proceedings in bankruptcy. Accordingly, it was submitted that there being no requirement in the BR that leave was required for commencing bankruptcy proceedings founded on a judgment entered more than six years previously, no such leave was required. As such, the only bar to the commencement of bankruptcy proceedings would be if and when a judgment creditor is barred by s. 6(3) of the Limitation Act 1953 - so ran Counsel's submission.

I regret I find Counsel for the judgment creditor's submission regarding this part of the case unacceptable. In my opinion, the overriding consideration here is, as I have indicated, the proper interpretation of s. 3(1)(i) of our Act. I am not at liberty to brush aside the explicit provisions of s. 3(1)(i) merely because of r. 276 of the BR. Accordingly, if there is any conflict between these two measures I would regard s. 3(1)(i) as having overriding effect since it ranks as principal legislation whereas the BR are subsidiary legislation. (See s. 23(1) the Interpretation (States of Malaysia) Act 1967). In my view, therefore the UK decisions are of direct relevance when construing s. 3(1)(g) of our Act and I would respectfully follow them. Accordingly I must next consider whether at the material time the judgment creditor in this case was in a position to issue execution of the judgment. The question arises, what is the material time?

In *re Gopal*, V.C. George J held (at para. 9) that the material date was not the date of issue of the bankruptcy notice but the date of it's service. In so holding, he appears to have been swayed by the decision of the Court of Appeal in *Ex parte Ide* for he says (at para. 5):

> In the judgment of the English Court of Appeal in *Ex parte Ide* [1886] 17 QBD 755 it was held that when a creditor has obtained judgment against a firm but has not obtained the requisite leave of Court to issue execution against a person alleged to be a member of the firm, he cannot effectively serve such a person with a bankruptcy notice.

It also appears that in referring to the ratio in *Ex parte Ide* he relied on the headnote to the report of that case. However it seems to me that a reading of the three judgments in that case makes it clear that the Court of Appeal held (as I have already said) that on the proper construction of the subsection concerned, to entitle a creditor *to issue* a bankruptcy notice he must be in a position to issue execution on his judgment **at the time when he issued his bankruptcy notice**. To demonstrate I propose to reproduce the relevant passages in the three judgments.

In the first place I shall refer to the following passages in the judgment of Esher MR at p. 759 para. 2:

> Under these circumstances, is he a person against whom under s. 4 subsection 1(g) of the Bankruptcy Act, **a bankruptcy notice can be issued**, upon failure to comply with which he can be made a bankrupt? Subsection 1(g) says: "If a creditor has obtained a final judgment against him" (that is against a person whom he proposes to make a bankrupt) "for any amount and execution thereon not having been stayed," has served on him a bankruptcy notice. It is true that in the present case, execution on the judgment has not been stayed, but the word seems to me necessarily to imply that the judgment must be one upon which execution could go immediately, unless it was stayed. But here execution cannot go immediately whether it is stayed or not; it cannot go without the leave of the Court. I think therefore that this was not a final judgment such as is described in subsection 1(g) on which **a bankruptcy notice could issue**. (Emphasis supplied)

Next I shall refer to the following passages in the judgment of Bowen LJ where the point is made even more emphatically at p. 759, para. 4:

> With regard to the construction of subsection 1(g) of s. 4, I also agree that in order **to entitle a creditor to issue a bankruptcy notice, he must in be a position to issue execution on his judgment at the time when he issues the bankruptcy notice.**
>
> (Emphasis supplied)

Lastly, I shall refer to the following passages in the judgment of Fry LJ at p. 760, para. 2:

> ... It would be strange if the enactment were that a bankruptcy notice could not be **issued** when execution on the judgment had been stayed and yet that a bankruptcy notice could be **issued** when execution could not go at all without the leave of the Court, and the proceedings had not been stayed simply for that reason.
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> (Emphasis supplied)

I regret therefore that I cannot agree with V.C. George J when he says in *Ex parte Gopal* that the relevant date for determining whether the creditor was in a position to issue execution on his judgment is the date of the **service** of the bankruptcy notice.

I would add that quite apart from authority, in principle, adopting the date of issue of a bankruptcy notice rather than the date of its service as the material time is fairer because delays in effecting service are often not the fault of a creditor. Indeed such delays could well be because the debtor is deliberately avoiding service.

Consequently, following *Ex parte Ide*, I would hold that the relevant date of the issue of the bankruptcy notice, he cannot serve one and so there cannot possibly be an act of bankruptcy as defined in s. 3(1) of our Act.

In the present case, I have already mentioned in the opening paragraph of this judgment that the judgment debt was dated 13 May 1982, and the bankruptcy notice upon which it was grounded was issued on 12 May 1988. This would be within the six year time limit imposed by O. 46 r. 2(1). There was therefore no need for leave to issue execution against the judgment debtor at the time of the issue of the bankruptcy notice and so this ground of objection fails.

The second point taken on behalf of the judgment debtor was that the bankruptcy notice includes interest not recoverable under the second limb of s. 6(3) of the Limitation Act 1953, which provides that "no arrears of interest in respect of any judgment debt shall be recoverable after the expiration of six years from the date on which the interest became due." A perusal of the judgment upon which the bankruptcy notice was grounded shows that it provides for the payment of interest on the judgment debt "at a rate of 8% calculated from 12 March 1982 to date of payment or realisation". The bankruptcy notice was, as I have already noted, issued on 12 May 1988 and served on the debtor on 9 June 1988.

It therefore does not include an element of interest, recovery of which is barred by s. 6(3) of the Limitation Act; namely, a trifling sum of interest in respect of a period of just two months. Accordingly, the sum specified in the bankruptcy notice as being due by way of interest exceeds the amount actually due.

However, our Act by proviso (ii) to s. 3(2) reads as follows:

> Provided that a bankruptcy notice:
>
> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake;...

In this case, the judgment debtor had affirmed and filed an affidavit in the Registry of the Court on 20 June 1988 disputing the sum specified in the judgment notice as the amount due, and served the same on the judgment creditor's solicitors on 21 June 1988.

But, the seven day period stipulated in the bankruptcy notice as being the time allowed for disputing payment had expired at midnight on 16 June 1988 with the result that the notice given to the judgment creditor was out of time. Consequently, in the words of proviso (ii) the bankruptcy notice "shall not be invalidated by reason only that the sum specified in the notice exceeds the amount actually due" and therefore this ground of objection fails.

(See *Dato Loh Fook Yue, ex parte Malayan United Finance Bhd.* [1988] 3 MLJ 499).

In any event, I am of the view that having regard to the particular circumstances of this case, the defect in the bankruptcy notice was a mere irregularity which had caused no substantial injustice and so can and should be condoned under s. 131 of our Act. (See *Rengasamy Pillai v. Comptroller of Income Tax 1970* [1970] 2 MLJ 233 PC).

For the same reasons, the contention that the bankruptcy notice includes penal interest, must be rejected. In any event, I am satisfied that the bankruptcy notice includes nothing of that sort.

The third point taken on behalf of the judgment debtor was that the schedule to the bankruptcy notice does not specify the exact amount of interest due contrary to the Supreme Court decision in *Ghazali bin Mat Nor v. Southern Bank Bhd.* [1989] 1 CLJ (Rep) 35.

A perusal of the bankruptcy notice shows that it does specify the exact amount claimed to be due on the judgment dated 13 May 1982 and the accompanying schedule stapled to the bankruptcy notice gives the particulars as to how that sum is arrived at. In the circumstances, it seems to me, that there is nothing in the point.

The fourth point taken was that it had not been shown that the solicitors who applied for the issue of the bankruptcy notice pursuant to Form 4 of the BR had the authority to do so.

I am satisfied from a perusal of the affidavit of the judgment creditor's manager Ong Chin Huat affirmed to on 3 December 1988, (encl. 10) to which is attached the letter of authority dated 10 May 1988 that the solicitors concerned had the requisite authority to issue the bankruptcy notice and nothing more need to be said about the point.

The fifth point taken on behalf of the debtor was that the proceedings herein ought to have been filed not in the High Court, Penang, but in the High Court, Alor Setar, as he had been at all material times a resident in the State of Kedah.

I note that r. 109(1) of the BR provides that a bankruptcy notice shall be issued by the Court in which a bankruptcy petition against the debtor may subsequently be filed. And, r. 101(2) of the BR provides that:

> where the debtor has for the greater part of one year immediately preceding the presentation of the petition carried on business in one state and resided in another state the petition shall be filed in the Court of the state in which he has carried on business.

Clearly, that has been a breach of r. 109(1) of the BR and so the question arises whether the same should be condoned under the provisions of r. 274 of the BR which provides:

> Non-compliance with any of these rules or with any rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit.

The case of *Nova Sdn. Bhd. v. Kaseh Sayang Realty Sdn. Bhd.* [1988] 2 MLJ 268 reminds us of the familiar proposition that the High Court of each state in our country are but branches of the High Court of Malaya and that each branch has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state.

I have no doubt, therefore, that I have jurisdiction to rule on the validity of the bankruptcy notice. Furthermore, much time has been spent hearing legal argument as to the validity of the bankruptcy notice and, being satisfied that the breach is a mere irregularity, I shall therefore in the exercise of my discretion, condone the same under r. 274.

Accordingly, this ground of objection fails.

A final point was taken that the judgment creditor owes the judgment debtor costs in the matter of bankruptcy no. 119/85.

The short answer to this is that the alleged costs have not been taxed and so is not a liquidated sum or money demand which is ascertainable with certainty. (See *Ratna Ammal v. Tan Chow Soo* [1971] 1 MLJ 277).

In all the circumstances, the application to set aside the bankruptcy notice is dismissed and I would declare that the judgment debtor has committed an act of bankruptcy from date hereof.

Also found at [1990] 1 CLJ 176